

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

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3 In Re: Oral Phenylephrine  
4 Marketing and Sales Practices  
5 Litigation

23-MD-3089 (BMC)

United States Courthouse  
Brooklyn, New York

6 April 2, 2024  
7 6:00 p.m.

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9 TRANSCRIPT OF CIVIL CAUSE FOR PROCEEDING  
10 BEFORE THE HONORABLE BRIAN M. COGAN  
11 UNITED STATES SENIOR DISTRICT JUDGE

12 APPEARANCES

13 For the Plaintiffs: DOUGLAS & LONDON  
14 BY: MICHAEL LONDON, ESQ.  
15 FEGAN SCOTT LLC  
16 BY: ELIZABETH FEGAN, ESQ.  
17 LIEFF CABRASER HEIMANN &  
18 BERNSTEIN LLP  
19 BY: JONATHAN SELBIN, ESQ.  
20 DI CELLO LEVITT GUTZLER LLC  
21 BY: ADAM LEVITT, ESQ.  
22 SULTZER & LIPARI PLLC  
23 BY: JASON SULTZER, ESQ.  
24 SEEGER WEISS LLP  
25 BY: CHRISTOPHER SEEGER, ESQ.

(Continued on next page.)

1 (Appearances)

2

3 For Defendant COVINGTON & BURLING LLP  
4 Procter & Gamble Co. BY: ANDREW SOUKUP, ESQ.

5

6 For Defendant KIRKLAND & ELLIS  
7 GlaxoSmithKline BY: JAY LEFKOWITZ  
8 Consumer Healthcare  
9 Holdings

10

11 For Defendant O'MELVENHY & ELLIS  
12 Johnson & Johnson BY: HANNAH CHANOINE  
13 Consumer

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22 Proceedings recorded by mechanical stenography. Transcript  
23 produced by computer-aided transcription.

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1 (Video Conference.)

2 THE COURT: Let's call the case and not get  
3 appearances, which I assume the court reporter has already  
4 gathered.

5 THE COURTROOM DEPUTY: Good afternoon. In Re: Oral  
6 Phenylephrine Marketing and Sales Practices Litigation.

7 THE COURT: Case 23-CV-MDL-3089.

8 I think there is about, if I'm counting right, 60  
9 people on the phone. Obviously I'm only go to have one  
10 spokesperson per party, and hopefully less than that.

11 We've got a lot to talk about. I'd like to plow  
12 through it like Sherman through Georgia if we can.

13 Let me ask this about the plaintiffs' counsel  
14 proposal as to who is going to represent what and how many  
15 firms we're going to have. The plaintiffs seem all in  
16 agreement -- I'll get to the defendants in a minute -- the  
17 plaintiffs seem in agreement, am I right about that?

18 MR. LONDON: Yes, the consensus of the plaintiffs is  
19 that we are in agreement.

20 THE COURT: I have to find your box. I see you.

21 The defendants had some concern about appointing  
22 someone to be class counsel at this point. Let me hear from  
23 the defendant who raised that concern.

24 MS. CHANOINE: Yes, your Honor. Hannah Chanoine on  
25 behalf of Johnson and Johnson Consumer, but I'll be speaking

1 on behalf of the joint defendants on this point.

2 We have concerns with the request for appointment of  
3 interim class counsel because what class are we talking about?  
4 It's premature. It's not clear what classes they will be  
5 appointed to represent. The motion doesn't identify a  
6 proposed class. There is no consolidated complaint that  
7 identifies a class.

8 And we don't have an objection to the Court  
9 appointing a leadership structure, obviously; but the  
10 plaintiffs haven't explained why interim class counsel is  
11 necessary or appropriate.

12 THE COURT: As I understand it, the interim class  
13 counsel they want to appoint is the same as one of the  
14 leadership positions they are already filling. So what is the  
15 harm?

16 MS. CHANOINE: To the extent --

17 THE COURT: I agree, it's vague. It doesn't really  
18 tell us what they are going to do. But if they want it, does  
19 it cost the defendants anything? Does it cost the case any  
20 inefficiencies?

21 MS. CHANOINE: Your Honor, the vagueness is itself  
22 the problem. We don't really know what this is going to  
23 encompass. And we certainly don't want to be waiving any of  
24 our any concerns that might arise later.

25 THE COURT: Okay. Mr. London, are you trying to get

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1 a leg up on class certification to say, aha, there must be a  
2 class because we have class counsel appointed?

3 MR. LONDON: Absolutely not -- I probably am, your  
4 Honor, but I'm not. We're not, your Honor.

5 We're surprised that this objection -- we think,  
6 obviously it should be done and it will assist in allowing us  
7 to move forward to get to the topic of complaint and master  
8 complaint and the form it will take. As set forth in our  
9 papers and response, this is quite standard, and we hope we  
10 can get past this with counsel.

11 THE COURT: Let's not worry about standard or we'll  
12 get too early in a crabs path, a place I don't want to be.

13 What is the harm to get that presumably and then  
14 revisiting the idea of class counsel?

15 MR. LONDON: I don't think there is a harm. If your  
16 Honor wants to hear more argument on this, frankly, as the  
17 consensus group we have placed folks to argue this,  
18 Mr. Levitt, if you want to hear the strong beliefs why it is  
19 appropriate and warranted now. I'll turn to the tables to  
20 Mr. Levitt. As your Honor said, there is no significant harm;  
21 but frankly, there is no harm in not doing it.

22 THE COURT: Okay. I can see harm in doing it. Just  
23 because it's jumping the gun because we don't know who the  
24 class counsel is representing without a definition of the  
25 class. So I'd like at least a proposed definition of the

1 class before I go ahead and appoint class counsel.

2 I'll give you one more pitch at it, Mr. Levitt, then  
3 I want to move on.

4 MR. LEVITT: Adam Levitt on plaintiffs' behalf. I  
5 occasionally will stutter when I speak. It's not a problem  
6 for me, and shouldn't be for you. Anything that I say that  
7 isn't a hundred percent clear, I'll go right back over it.

8 THE COURT: Okay.

9 MR. LEVITT: In terms of your Honor's question about  
10 what is the harm. Could we push it down the road, sure we  
11 could. But traditionally, not even traditionally in every  
12 class case that I've been involved in, whether it's been  
13 certainly as large a group as this, appointing interim class  
14 counsel creates a sense of clarity and purpose. We then are  
15 able to speak for the class we ultimately propose. We're not  
16 asking for an appointment of actual class counsel, which will  
17 occur at the class certification stage. We're asking for the  
18 interim appointment, which let's us go forward and speak for  
19 the proposed class.

20 In terms of the defendants' point that they don't  
21 want to waive anything. The defendants aren't waiving  
22 anything. They will have every opportunity at the class  
23 certification stage to say we are no good at what we do;  
24 that's a conversation we can have at that point.

25 But in between now and then, there is no harm in

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1 appointing. And it creates a greater sense of efficiency and  
2 streamlining the process and investing us to the proposed  
3 leadership group with the ability to speak for whatever class  
4 we ultimately seek certification of and the ultimate  
5 appointment as class counsel.

6 THE COURT: Go ahead. I will appoint the proposed  
7 class interim class counsel, interim class counsel. I will  
8 expressly declare that it is without the waiver of any rights  
9 on the part of the defendants. It is not a precursor to say  
10 that class action treatment is appropriate for this case or  
11 that any proposed definition of a class or sub class is  
12 appropriate. That's all reserved.

13 But the plaintiffs seem to think there is something  
14 useful that might come of that; I can't see any harm to it.  
15 So go ahead let's do that. Okay.

16 MR. LEVITT: Thank you, your Honor.

17 THE COURT: Next, the defendants are not interested  
18 in any liaison counsel; is that right?

19 MS. CHANOINE: Yes, your Honor. We see no need for  
20 formal organization of defense counsel or appointment of  
21 defense liaison counsel at this time. We have been operating  
22 in a coordinated and efficient manner. We have been able to  
23 communicate in an efficient manner and will continue to do so.  
24 Frankly, appointment of lead defense counsel unnecessarily and  
25 unfairly burdens any particular defendant with additional cost

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1 and burdens of leadership. And we just haven't seen any need  
2 for it at this stage.

3 Plaintiffs' counsels' experience in other cases is  
4 not relevant or sufficient reason. We have contrary  
5 experience among us. They haven't identified any real reason.  
6 At minimum, we would prefer any discussion around this to wait  
7 until after a motion to dismiss. If the Court thinks it's  
8 beneficial, we can also discuss the proposals.

9 THE COURT: With one caveat. I'll let the  
10 defendants do their own representations just like I'm letting  
11 the plaintiffs do theirs. But if there is going to be a  
12 motion directed to what I think will be a consolidated  
13 complaint, which we'll talk about in a second, if I get 12  
14 largely identical briefs, I'm not going to be happy about  
15 that.

16 MS. CHANOINE: If I may speak to that, your Honor.

17 I think I can represent very forcefully on behalf of  
18 defense group that is unilaterally not our plan. I can hand  
19 it over to Mr. Soukup to speak more on that, on the subject of  
20 our proposal on a motion to dismiss directed to a consolidated  
21 master complaint, but our plan right now is one motion to  
22 dismiss.

23 THE COURT: Okay.

24 MS. CHANOINE: We can address the threshold  
25 preemption issues.



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1 THE COURT: I don't think I need to hear from anyone  
2 else on of that. That's my only concern.

3 Plaintiffs are in no position to insist on a liaison  
4 counsel for the defendants, right, Mr. London?

5 MR. LONDON: No, your Honor, with that  
6 representation; that was obviously a concern of ours. As I'm  
7 in a case with another group here and we have been working  
8 cooperatively with the three or four defense spokespersons to  
9 date. What I have seen in the past is at times when other  
10 issues come up, we are forced to -- in that other case -- meet  
11 and confer with nine different products makers. I hope that  
12 doesn't come up.

13 But as counsel has represented, we'll continue to  
14 work with their three or four spokespersons that will serve in  
15 this quasi-liaison role. We don't care, that's fine.

16 THE COURT: That's fine.

17 So next let's talk about a consolidated complaint.  
18 The plaintiffs are in favor of that?

19 MR. LONDON: I'm going to turn the mic over to  
20 Jonathan Selbin to speak to that.

21 MR. SELBIN: Thank you, Mike. And thank you, your  
22 Honor.

23 We will obviously take on the job of putting  
24 together a consolidated master complaint. That's going to  
25 take a little bit of time post-appointment of leadership. And

1 so, in light of that, and in light of what we have heard from  
2 the defendants about their desire to get the preemption issue  
3 teed up early, which we welcome -- we think this isn't a case  
4 that is subject to preemption, so we think we'll be able to  
5 persuade your Honor of that. That's an issue for another day.

6 We have a proposal that we'd like to discuss with  
7 the defendants. We haven't had an opportunity to meet and  
8 confer with them about it yet, but I will flag it. Which is,  
9 that we essentially endeavor to get on file in very short  
10 order what I would call a skinny complaint or a bellwether  
11 complaint. Essentially, allegedly, the core claims for a  
12 single state, we would suggest New York would be an obvious  
13 choice given that your Honor is New York federal judge  
14 familiar with the laws of New York, but we can talk to the  
15 defendants about what state. And essentially allow them to  
16 file a motion to dismiss on preemption grounds early, which  
17 they want to do against that complaint, while we continue to  
18 work on putting together the master complaint.

19 And the reason there is, as your Honor knows, there  
20 are a couple dozen or more defendants here at issue for who  
21 the issue, the laws of many states with a large number of  
22 plaintiffs and getting that fully put-together master  
23 complaint is not going to enable us, I don't think, to get  
24 this preemption motion teed up early. That would be our  
25 proposal. Again, we haven't met and conferred yet; we're

1 happy to do that.

2 We would seek some guidance from your Honor about  
3 your willingness to consider that kind of approach.

4 THE COURT: Let me hear if any defendant, without  
5 committing yourself, you haven't had a chance to think about  
6 it or talk to each other, does anybody have an adverse  
7 reaction to that?

8 I appreciate what counsel is saying. The  
9 consolidated complaint is going to have to go through the  
10 separate consumer statutes in 50 states that's not all  
11 representative to the preemption issue. I think there are  
12 central issues that probably span all 50 states that you  
13 probably could cover in one, as counsel called it, skinny-down  
14 complaint. Anyone think that's totally not viable, we don't  
15 even want to think about it?

16 MR. SOUKUP: I'll be speaking on behalf of all the  
17 defendants here. From our perspective, that's an intriguing  
18 proposal. That's the first we're hearing about it. We ask  
19 the plaintiffs to share their views, since this is the first  
20 time we're hearing about it.

21 But our initial reaction is we're a little concerned  
22 about the prospect of whack-a-mole and piece meal having to  
23 address piece meal issues here in a variety of situations. It  
24 could be inefficient for us if we get the benefit of the  
25 Court's ruling granting preemption, and then for plaintiffs to

1 turn around and say, well, okay, that's now not going to  
2 happen so here is the next one. But the idea, while I invite  
3 other defendants to weigh in, it does have some appeal to  
4 getting the threshold of cross-cutting issues resolved early.  
5 From our perspective, that should be the absolute first issue  
6 that the Court considers here. We do think there is a strong  
7 preemption defense.

8 THE COURT: I think if we go with this, Mr. Selbin,  
9 you got to commit to it. That is to say, if I find there is  
10 preemption -- I have no idea at this stage whether there is  
11 preemption -- then you can't say, okay, the judge has granted  
12 the motion to dismiss now we'll file an amended complaint that  
13 we think can get around preemption. Because that defeats the  
14 purpose. We'd be at just as long a schedule as having a  
15 master consolidated complaint with a full exposition as there  
16 could possibly be.

17 MR. SELBIN: I think it's a fair point, your Honor.  
18 In the context of meeting and conferring with the defendants  
19 on this, which we can do this week as far as I'm concerned, we  
20 can address that proactively in our discussions.

21 I do think, for what it's worth, that we can  
22 probably get that skinny New York, or whatever complaint it's  
23 ultimately going to be, on file certainly this month. So I  
24 think that will move the process forward and allow them to get  
25 their early shot at the preemption issue.

1 THE COURT: I'm going to leave it to everybody to  
2 talk and see if you can work something out. Obviously, I  
3 think any defendant probably has a veto on the whole thing  
4 since we don't have a spokesperson for all defendants. If  
5 every defendant can get behind one plan, reach an agreement  
6 with the plaintiffs, I think that might work, might. Okay.

7 MR. SELBIN: Thank you, your Honor.

8 THE COURT: Next, evidence preservation. I assume  
9 that all the defendants' counsel put their clients on notice,  
10 everything is being preserved. This is not going to be a  
11 problem, right?

12 MS. CHANOINE: That's correct, your Honor.

13 THE COURT: And I take it, you're going to start  
14 giving me proposed confidentiality orders, protocols, things  
15 like that, there are a lot of documents to search here. When  
16 can I expect those? Do I have to wait for a master complaint  
17 or even the skinny complaint on preemption to get those  
18 preliminary orders out of the way?

19 MR. LONDON: No. I think those foundational orders  
20 given the, I believe appointment, of a steering committee,  
21 that could move forward. We can begin those processes with  
22 the defendants with the proposed protective order. We can  
23 send them a small working group already on some of the ESI  
24 issues, a topic I'm very familiar with. But we'll get  
25 together with the defendants and get something committed to

1 the Court. I venture to say within 30 days, but hopefully  
2 three weeks or so, on a protective order on the side protocol.

3 MS. CHANOINE: May I be heard on this?

4 THE COURT: Sure.

5 MS. CHANOINE: Thank you. We have no objection to  
6 starting to work on some of these preliminary issues like  
7 protective orders, ESI orders. I do anticipate it will take  
8 sometime.

9 One of the downsides with large industry MDLs like  
10 this is it creates complexity because many of the defendants  
11 here are competitors. So there are appropriate protections  
12 that need to be negotiated, not just with the plaintiffs but  
13 also taking into account that defendants here, while we are  
14 committing to working cooperatively here, we are also  
15 competitors. Based on my experience in other cases, sometimes  
16 this takes 60 days to work out. We'll work as expeditiously  
17 as we can and work with the plaintiffs on this here too.

18 THE COURT: I understand the competitive pressures  
19 and there are ways to do it, with attorneys-eyes-only and  
20 firewalls, things like that, you know all those ways.

21 Sixty days seems a little long for me; but if you  
22 really do it in 60 days, I won't care. So see if you can do  
23 that. Okay.

24 Next, I think the plaintiffs raised the issue of  
25 Rule 26 disclosures. What is up with that?

1 MR. LONDON: We think, at least at this point, to  
2 get the automatic disclosures from the defendants we certainly  
3 don't need them, and my count is 102 cases, but instead a  
4 master set of these disclosures. Everything has been stayed  
5 since the transfer to your Honor, and some district courts  
6 before that. We think at the very least getting a master set  
7 from each defendant moving forward. We can discuss with  
8 counsel a timeline if they need 30 days or 45 days from now.  
9 But that's what we think would be prudent to move forward with  
10 discovery at this point and then engage on the 26(f)  
11 conference on other matters.

12 THE COURT: I don't know how the defendants feel  
13 about it. It seems to me, in a case like this, it's really  
14 hard to do Rule 26 disclosures this early in the case. Maybe  
15 they take the Rule 26 disclosure very seriously. I don't let  
16 them get that summary judgment if they didn't disclose. I'm  
17 not sure everybody knows their case well enough to be able to  
18 say what evidence supported it at this early stage. But if my  
19 concern is not well-based, then fine, let's get it going  
20 because that's what you're going to use to start drafting your  
21 interrogatories and document requests.

22 Any defendants share my concern? Or you think you  
23 can get that in in 30 or 45 days?

24 MR. LEFKOWTIZ: Jay Lefkowitz representing  
25 GlaxoSmithKline but speaking for the whole group.

1 I think that it's very hard to understand where this  
2 case is going. What would be appropriate in the initial  
3 disclosure, especially hearing your perspective on how  
4 seriously you take them, and we will take them just as  
5 seriously as the Court does, without seeing the master  
6 complaint, without understanding what the real target is here,  
7 I think there is a lot of work that can't really be done. The  
8 complaint really should be the first salvo in this case. And  
9 I know it may take them a little bit of time, but we are  
10 already anticipating what that is going to look like, so we're  
11 already working on our motion to dismiss.

12 And I actually think maybe the most efficient thing  
13 to do so that we don't have to worry about this kind of  
14 specter of whack-a-mole, is figure out how much time they need  
15 to get their master complaint in. Everything can tee off from  
16 there.

17 But we will represent that we can file our motion  
18 very shortly after that is filed. Because, as I said, we're  
19 already anticipating what it is going to be, we're drafting,  
20 and we'll just have to fine tune things when we see their  
21 complaint. Then we can get all the rest of this on the road.

22 THE COURT: Are you talking about the skinny  
23 complaint or the big complaint?

24 MR. LEFKOWITZ: I'm talking about the large  
25 complaint, the real complaint that they are going to file.



1           Because my only concern is they will file a  
2           complaint under New York and then they are going to, in the  
3           context of other state law issues, raise different types of  
4           conduct. And then all of a sudden, we're not necessarily  
5           going to have a ruling that addresses everything that they are  
6           alleging would be at issue.

7           THE COURT: It's just disclosure. It's not any  
8           rulings. Basically, if you look at any random sample of five  
9           complaints that have been filed, even before they are  
10          consolidated, you know what they are being sued for. Right.

11          Let me put it this way, because you don't have a  
12          consolidated complaint I'll be more forgiving than I usually  
13          am in a Rule 26 disclosure that needs to be supplemented after  
14          the consolidated complaint is filed. If there is something in  
15          there that you go, I couldn't anticipate this, there is  
16          something strange about Wyoming law that I didn't know about,  
17          that would be fine. But I really think I don't want to wait  
18          60 days to get a consolidated complaint and then have the Rule  
19          26(a) disclosures. It's just waiting too long.

20          Look, we boil down to brass tacks. Everybody knows  
21          what this case is about. Really. There will be lots of legal  
22          issues and nuances and all that in terms of the facts and what  
23          happened and who knew what when. You know where to look for  
24          those documents. To the extent they help your case, you can  
25          start identifying. Let's start in 45 days.

1 MR. LEFKOWITZ: That would be for both plaintiffs  
2 and defendants?

3 THE COURT: Absolutely. As you know, the plaintiffs  
4 won't have all that much to do. Okay.

5 Defendants said there are some improperly named  
6 defendants. Who is improperly named?

7 MS. CHANOINE: I represent Johnson & Johnson, but  
8 I'm speaking for the joint defense group on this issue.

9 We have provided the plaintiffs with a list that  
10 spans multiple defendants. And the problems are quite -- they  
11 cross the spectrum. We have completely fictitious defendants.  
12 We have holding company defendants that have no role at all.  
13 We have foreign defendants that are not under this Court's  
14 jurisdiction and haven't been properly served. We have  
15 predecessor entities that are not properly named before the  
16 case.

17 We have provided that list. We propose that we go  
18 through a process of meeting and conferring with plaintiffs'  
19 counsel and look to potentially streamline the process of  
20 dealing with improperly named defendants through the process  
21 of the filing of the master complaint.

22 THE COURT: Are both sides on board with this  
23 discussion?

24 MR. LONDON: Your Honor, we received the first list  
25 of, air quote, improperly named defendants from counsel Friday

1 night; and we thanked her for sending it. First we saw the  
2 issue was in the agenda they provided. We received a  
3 supplement from them today of the improperly named defendants.  
4 I have not looked at it yet. Of course, we will meet and  
5 confer with them.

6 I am looking at some of the names right now. It's  
7 the Kenvue defendant, which is the new J&J. It looks like GSK  
8 was probably the most improperly named. It just seems like --  
9 I really can't speak to it. It seems like they might be  
10 improperly the proper name of the company. But we'll engage  
11 with counsel this week to clean up the improperly named  
12 defendants. We've done this with some of these defendants in  
13 the past, in other litigation. We will engage and meet and  
14 confer as soon as possible.

15 THE COURT: I mean, you're going to have some  
16 improperly named defendants as a pure holding company. Do  
17 what you can and bring issues to me as soon as you can when  
18 you have a joint issue, when you come to an impasse. And  
19 let's try to get those resolved. We have to know who the  
20 right parties are before we can do much else.

21 MR. LONDON: Should we bring those to you in a 37.3  
22 letter discovery issue?

23 THE COURT: Yes, exactly. What I like for those  
24 kind of letters, is I like a joint letter where both sides put  
25 in their positions. And I'll either decide it based on that

1 letter or I'll tell you here is what I need more from each  
2 side to figure it out.

3 MR. LONDON: Thank you.

4 THE COURT: I think that's all on my agenda. What  
5 else does anybody have? It would be amazing if everybody says  
6 nothing.

7 MR. LONDON: I'm looking at my list, your Honor.

8 A minor issue. Would it be possible establishing  
9 future case management conferences with the Court so we could  
10 have them on our calendar? I recognize -- I love the name  
11 "skinny complaint" due in 30-odd days, then some motion  
12 practice. So if we could establish some benchmarks going  
13 forward, every 45 days or so.

14 THE COURT: Let's do 45 days to start. Let me pick  
15 a date for that. If I'm off trial we won't have to do in the  
16 evening.

17 MR. LONDON: I invited everybody to Brooklyn.

18 THE COURT: I wasn't sure how well a call of this  
19 size would work, but it obviously is a huge savings for a lot  
20 of lawyers and their clients to not have to come to one place  
21 for a relatively short conference.

22 Let's say May 23 at 10:00 a.m. again by video.  
23 Going once, okay.

24 I want to get to the point where we do every 60  
25 days, and maybe even every 90 days. But to start out we

1 should stick to the 45 days.

2 Okay. Anything else we need to talk about? All  
3 right. Thank you all for calling in. Nice to meet you all.  
4 We will be talking soon, I'm sure. Take care. We're  
5 adjourned.

6 (Whereupon, the matter was concluded.)

7 \* \* \* \* \*

8 I certify that the foregoing is a correct transcript from the  
9 record of proceedings in the above-entitled matter.

10 /s/ Rivka Teich  
11 Rivka Teich, CSR RPR RMR FCRR  
12 Official Court Reporter  
13 Eastern District of New York  
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